8100 EMINENT DOMAIN: FAIR MARKET VALUE (TOTAL TAKING)

The sole question in the Special Verdict asks, "What was the fair market value of the property on (date of evaluation)?"

In answering this question, consider only the price for which the property would have sold on (date of evaluation) by a seller then willing, but not forced, to sell, to a buyer who was then willing and able, but not forced, to buy. Fair market value is not what the property would sell for at a forced sale or at a sale made under unusual or extraordinary circumstances, or what might be paid by a particular buyer who might be willing to pay an excessive price for his or her special purpose. In determining fair market value, you should not consider sentimental value to the seller or his or her unwillingness to sell the property.

You should consider the use to which the property was put by the owner or any other use to which it was reasonably adaptable. You may base your determination on the most advantageous use or highest and best use shown to exist, either on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). The terms "most advantageous use" and "highest and best use" have the same meaning. The highest and best use, or the most advantageous use, of the property, is the use to which the property could legally, physically, and economically be put on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). If you consider future uses, they must be so reasonably probable as to affect fair market value on (date of evaluation). They must not be merely possible uses based upon speculation, theory, or conjecture. You

should consider every element that establishes the fair market value of the property.

SPECIAL VERDICT

What was the fair market value of the property on (date of evaluation)?

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COMMENT

This instruction and comment were approved in 2006. The comment was revised in 2009, 2010, 2011, 2014, 2015, 2020, and 2022. The 2020 revision updated case law citations. This revision was approved by the Committee in October 2022. Both the January 2022 and October 2022 revisions added to the comment.

Wis. Stat. § 32.09(5).

Fair Market Value. The definition of "fair market value" is taken from Arents v. ANR Pipeline Company, 2005 WI App. 61, 281 Wis. 2d 173, 189, 696 N.W. 2d 194 (Ct. App. 2005). The principle that the trier of fact is to consider every element which would be considered by the buyer and the seller in the marketplace in setting the price for the subject property on the date of taking is found in Ken-Crete Products Company v. State Highway Commission, 24 Wis.2d 355, 359-360, 129 N.W.2d 130 (1964), Herro v. Department of Natural Resources, 67 Wis.2d 407, 420, 227 N.W.2d 456 (1974) and Clarmar Realty Company, Inc. v. Redevelopment Authority of the City of Milwaukee, 129 Wis. 2d 81, 91, 383 N.W.2d 890 (1986). See also 260 North 12th Street, LLC v. State of Wisconsin Dep't of Transportation, 2011 WI 103, 336 Wis.2d 150, 805 N.W.2d 381.

Date of Evaluation. Under Wis. Stat. § 32.09(1), the value of the subject property in eminent domain valuation litigation is to be determined as of the date of evaluation. Schey Enterprises, Inc. v. State, 52 Wis.2d 361, 190 N.W.2d 149 (1971). For a taking under Wis. Stat. § 32.05, the date of evaluation is the date the award is recorded in the register of deeds office, which is also the date of taking. For a taking under Wis. Stat. § 32.06, the date of evaluation is the date of filing the lis pendens.

Unit Rule. In a total taking, fair market value must be determined using the "unit rule." Green Bay Broadcasting v. Redevelopment Authority, 116 Wis.2d 1, 342 N.W.2d 27 (1983); see also Hoekstra v. Guardian Pipeline, 2006 WI App 245, 298 Wis.2d 165, 726 N.W.2d 648; The Lamar Co. v. Country Side Restaurant, 2012 WI 46, 340 Wis.2d 335, 814 N.W.2d 159.

The Wisconsin Supreme Court discussed the "unit rule" in City of Milwaukee Post No. 2874 VFW v. Redevelopment Authority, 2009 WI 84, 319 Wis.2d 553, 768 N.W.2d 749. The issue in the case was expressed as follows: "If the VFW, which holds a long-term favorable lease, receives no compensation for its leasehold interest under the unit rule, has the VFW's right to just compensation under Article I, Section 13 of the Wisconsin Constitution been violated? In other words, the court is asked to determine whether the application of the unit rule in the present case violates the just compensation clause when the fair market

value of the property is zero, rendering the VFW entitled to $0 for the loss of its property interest as a lessee."

The court concluded that using the unit rule in the case to value the whole property to determine the amount of compensation due to the VFW does not violate the just compensation clause. The court said that the VFW receives just compensation when it receives no compensation for its leasehold interest in a property that has no value.

The VFW court explained the unit rule as follows:

> . . . under the unit rule there is no separate valuation of improvements or natural attributes of the land, and the manner in which the land is owned or the number of owners does not affect the value of the property.[21] When property that is held in partial estates by multiple owners is condemned, the condemnor provides compensation by paying the value of an undivided interest in the property rather than by paying the value of each owner's partial interest.[22] Simply stated, the unit rule determines the fair market value as if only one person owned the property. When the value of the property is determined, the condemnor makes a single payment for the property taken and the payment is then apportioned among the various owners.[23]
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> That property is valued as an integrated and comprehensive unit does not mean that the individual components of value may not be examined or considered in arriving at an overall fair market value.[24] "The unit rule requires only that the various components be valued as contributing parts of an organic whole."[25]
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> In Wisconsin jurisprudence, "acceptance [of the unit rule] is beyond question."[26] Indeed the unit rule is accepted in the majority of American jurisdictions.[27] The unit rule is a carefully guarded rule and only in rare and exceptional situations are departures permitted.[28]

Jurisdictional Offer. For a taking under Wis. Stat. § 32.05, a jurisdictional offer does not have to equal the appraisal on which the offer is based. Otterstatter v. City of Watertown, 378 Wis.2d 697, ¶27, 904 N.W.2d 396 (Ct. App. 2017). Instead, the words "based upon" provided in § 32.05 (2)(b) and (3)(e) mean that "the appraisal must be a supporting part or fundamental ingredient of the jurisdictional offer." Id. at ¶24. See also, Christus Lutheran Church of Appleton v. Wisconsin Dept. of Transportation, 2021 WI 30, ¶30, 396 Wis.2d 302, 956 N.W.2d 837.

Likewise, the fact that a jurisdictional offer increases based on the re-evaluation of items "considered but not fully addressed in the initial appraisal" does not mean that the offer is not "based upon" the appraisal. Christus, supra, at ¶33. The statutory process provided in § 32.05 does not require that a condemnor stay with its initial offer based on its appraisal, "but rather it is required to negotiate to see if that number was too low." Otterstatter, supra, ¶28. There is no statutory prohibition against offering more than the appraised amount in the jurisdictional offer.

Environmental Contamination and Remediation Costs. In 260 North 12th Street, LLC v. State of Wisconsin Dept. of Transportation, 2011 WI 103, 336 Wis.2d 150, 805 N.W.2d 381, the Wisconsin Supreme Court held that a property's environmental contamination and the costs to remediate it are relevant to the property's fair market value if they would influence a prudent purchaser who is willing and able, but not obliged, to buy the property. 2011 WI 103, ¶7, 47, and 48. In this case, the trial judge instructed the jury according to JI-Civil 8100. See 260 North 12th Street, supra, ¶65-67.

Damages for the Taking of an Easement or a Loss of Direct Access. See 118th Street Kenosha, LLC v. Wisconsin Dept. of Transportation, 2014 WI 125, 359 Wis.2d 30, 856 N.W.2d 486.

[**Note**: In 118th Street, the Wisconsin Supreme Court assumed without deciding that a temporary limited easement was compensable under Wis. Stat. § 32.09(6g). However, in Backus v. Waukesha County, 2022 WI 55, ¶19, 402 Wis.2d 764, 976 N.W.2d 492, the court found that a "…reasonable reading of 32.09(6g) is that it applies only to easements that continue to exist beyond the completion of a public improvement project. Therefore, § 32.09(6g) does not apply to TLEs, which must instead be compensated under constitutional and common law principles."]